Supreme Court, U. S.
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80-151

No. .....

In the Supreme Court of the United States

October Term, 1980

ALTUS NEWSPAPERS, INC., an Oklahoma corporation d/b/a ALTUS TIMES DEMOCRAT, BOB GILMORE, SANDRA HART, and CRAIG HARRIS,
Petitioners (Defendants),

VS.

BILL AKINS,
Respondent (Plaintiff).

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA AND APPENDICES

HAROLD B. WAHL
WAHL AND GABEL
Suite 405, Florida Title Building
Jacksonville, Florida 32202
Telephone: (904) 353-7329
Attorneys for Petitioners

ROBERT H. KOONTS
P. O. Box 21008
Greensboro, North Carolina 27420

ROBERT S. BAKER
BAKER, BAKER & WILSON
2140 Liberty Tower
Oklahoma City, Oklahoma 73102
Of Counsel

August 1980

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

(a) QUESTIONS PRESENTED FOR REVIEW

1. On appellate review of a libel judgment in favor of a public official, does the First Amendment require that the appellate court review the record and find that the plaintiff public official proved his case by *proof of convincing clarity?* And must the jury have been so instructed?

The Oklahoma Supreme Court held "*any* competent evidence" was sufficient, and that "we *do not weigh* the evidence."

2. In such a case, is the Supreme Court of Oklahoma in constitutional and fundamental error when it holds (a) "We need only to determine if 'there is *any* competent evidence reasonably tending to support the verdict'" and (b) "Where there is *any* competent evidence reasonably tending to support the verdict, this Court does not disturb it"?

The Oklahoma court was in fundamental error in not reviewing the record to find proof of *convincing clarity;* and this Court should grant certiorari and reverse, ordering judgment for Petitioners.

(b) ALL PARTIES TO THE PROCEEDING ARE LISTED IN THE CAPTION.

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No. .....

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October Term, 1980

ALTUS NEWSPAPERS, INC., an Oklahoma corporation d/b/a ALTUS TIMES DEMOCRAT, BOB GILMORE, SANDRA HART, and CRAIG HARRIS,
Petitioners (Defendants),

vs.

BILL AKINS,
Respondent (Plaintiff).

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA AND APPENDICES

Petitioners, ALTUS NEWSPAPERS, INC., an Oklahoma corporation d/b/a ALTUS TIMES DEMOCRAT, BOB GILMORE, SANDRA HART, and CRAIG HARRIS, respectfully pray that writ of certiorari be issued to review the judgment and opinion of the Supreme Court of the State of Oklahoma entered October 4, 1977, rehearing denied and opinion modified May 12, 1980. This petition is filed under Supreme Court Rule 21 effective June 30, 1980.

(d) OPINION BELOW

The Opinion of the Supreme Court of the State of Oklahoma, Case No. 48,489, filed October 4, 1977, is reported at 48 O.B.J. 2231 and 51 O.B.J. 1206, 609 P.2d 1263. The Order denying rehearing (by a 5-to-4 vote) and modifying the Opinion (by a 6-to-3 vote) filed May 12, 1980 is reported at 51 O.B.J. 1206, 609 P.2d 1263. Copies of the Opinion and Order modifying it are attached as Appendices A and B.

(e) GROUNDS FOR JURISDICTION

(i) The Judgment and Opinion of the Supreme Court of the State of Oklahoma was dated and entered October 4, 1977 (Appendix A).

(ii) Rehearing was denied on May 12, 1980, but said Opinion was there modified as shown by Appendix B.

(iii) Not applicable.

(iv) The jurisdiction of this court is invoked pursuant to 28 U.S.C. 1257(c). The Judgment and Opinion of the Supreme Court of Oklahoma violates the rights of Petitioners granted by the First and Fourteenth Amendments to the Constitution of the United States in respect to freedom of speech and of the press.

(f) CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I:

"Congress shall make no law . . . abridging the freedom of speech or of the press. . . ."

Amendment XIV:

". . . (N)or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

(g) CONCISE STATEMENT OF THE CASE

Plaintiff-Respondent Bill Akins, an Oklahoma police officer, sued defendants (Petitioners) for libel. He said he was a public official (T.765,857,860,681) and was charged by the trial court (without objection) to be (T. 746-747, Appendix C-1) and held by the Oklahoma Supreme Court to be, such public official (Appendices A and B).[1] The case was tried and appealed on the basis he was a public official.

The Defendants ran a news story (incorporated in the Opinion of the Oklahoma Supreme Court - Appendix A) dealing with police officer Akins allegedly kidnapping a boy at gunpoint and then getting into an altercation with a county deputy sheriff. Akins admitted he had a gun in the truck (T.698,699,318,582), the boy was pulled into the truck (T.314), and Petitioners assert the story was substantially correct. The Oklahoma court disagreed and submitted the case to the jury.

There was no evidence to prove the Defendants had serious doubts as to truth. The Oklahoma Supreme Court expressly found there was no knowledge of falsity (Appendix A - page A5).

And certainly there was no such proof of *convincing clarity.*

The case went to the jury, which brought in a *split* verdict (over the vigorous dissent of the foreman) for $5,000 compensatory and $15,000 punitive damages.

---

1. See *St. Amant v. Thompson* (1968), 390 U.S. 727, holding a deputy sheriff to be a public official; and *Time v. Pape* (1971), 401 U.S. 379, holding a deputy chief of detectives to be a public official.

The question here is whether Plaintiff must prove his case with *"convincing clarity"* or whether, as held by the Oklahoma court, "*any* competent evidence" is sufficient.

(h) STAGE OF PROCEEDINGS WHEN FEDERAL QUESTIONS WERE RAISED

Attached hereto as part of Appendix C-1 are excerpts from instructions given by the trial court. In instruction 1 the court three times charged the jury that the burden of Plaintiff's proof was "by a *preponderance* of the evidence", which the court defined as "that evidence which to your minds is most convincing and seems most probably true" (T.737). In instruction 3 the court charged the jury four more times that the Plaintiff's burden was proof by a *"preponderance* of the evidence" (T.739,740). In instruction 3(g) the court two more times charged that Plaintiff's burden was "proof by a *preponderance* of the evidence." (T.740,741). Finally, in instructions 5 and 6, the court charged four more times that the Plaintiff must prove his case by "a preponderance of the evidence" (T. 755,757,758). Specifically in this instruction as to *punitive* damages, the instruction again was proof merely "by *preponderance of the evidence."* The court also on several occasions used the expressions "sufficient evidence" or "sufficient evidence to permit the conclusion", presumably again meaning "a preponderance of the evidence." Contrary to the above instructions, the trial court, apparently unnoticed and unheeded by the jury and at the *request of the Petitioners,* gave instruction 3(c) (T.743-744) charging that the Plaintiff must prove his case by "clear and convincing evidence".

So that, on a total of thirteen occasions, the jury was instructed that the burden of proof was by a mere

"*preponderance* of the evidence", and the court told the jury to take the instructions with them to the jury room (T.870). As stated, a split jury brought in a verdict for the Respondent.

The Defendants challenged the sufficiency of the evidence and moved for a directed verdict both at close of Plaintiff's case (T.586) and at the close of all the evidence (T.278). Such motions were immediately denied (T.589, 729).[2]

The lower court further denied motions for a new trial, and for judgment notwithstanding the verdict, in which motions the questions of the court's charges and the sufficiency of the evidence were raised (Appendix C-2). The gravamen of the appeal to the Oklahoma Supreme Court was that there was insufficient evidence to get to the jury under constitutional law (Appendix C-3 - Petition in Error). The Supreme Court of Oklahoma, instead of examining the record for proof of *convincing clarity,* held that all it had to do was "find *any* competent evidence reasonably tending to support the verdict," and that "we *do not weigh* the evidence." (Appendix A).

The question of no sufficient evidence was raised in both the trial court and in the Supreme Court of Oklahoma, as above indicated. However, under Oklahoma law, where there is *fundamental* error (as here), it is the duty of the Oklahoma Supreme Court to correct such fundamental error even if not properly raised below. See *Wat Henry Pontiac v. Pitcock* (Okla. 1956), 301 P.2d 203, cited by the Oklahoma Supreme Court in Appendix A; *Del City v. Moore* (Okla. 1971), 483 P.2d 324; *Basden v. Mills* (Okla.

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2. *Cf. Richmond Newspapers v. Virginia* (Case No. 79-243, July 2, 1980), ... U.S. ....., where this court granted certiorari and reversed the judgment; this even though reporters of the newspaper were present and *did not object* when the trial court first closed the trial to the public and press.

1970), 472 P.2d 889; and *Rogers v. Worthan* (Okla. 1970), 465 P.2d 431. See also *Beckley, infra.*

The Petition for Rehearing timely filed in the Oklahoma Supreme Court contained the following three grounds:

> "1. The opinion and order of this court is wholly inconsistent with the controlling decisions of the United States Supreme Court and prior decisions of this Court;
>
> "2. This Court is duty bound to *review the evidence* to make certain that the applicable constitutional standards have been properly applied by the trial court;
>
> "3. Appellants are entitled to judgment herein as a matter of settled constitutional law because appellee's *evidence* fails to meet the constitutional standards when measured by the proper constitutional evidentiary test requiring *'convincing clarity.'*" (Here and elsewhere, unless otherwise indicated, the italics are added by us.)

On rehearing, the Oklahoma Supreme Court had obviously considered (for two and one-half years from October 1977 to May 1980) the question of "clear and convincing evidence" as contrasted to "preponderance of the evidence." For, by a 5-to-4 vote, it denied rehearing (Appendix B), but by a 6-to-3 vote modified page 4 of the typewritten Opinion (48 O.B.J. at 2233), quoting instructions to the jury, to strike the instruction with the words "*preponderance* of the evidence" and insert in lieu thereof the instruction with the words "*clear and convincing evidence.*" However, the Court says nothing about proof adduced to sustain that burden and affirmed on the basis of "*any* competent evidence" (Appendix A as modified by Appendix B).

(j) REASONS FOR THE ALLOWANCE OF THE WRIT

The Supreme Court of Oklahoma, in this case, has completely misinterpreted the effect and holding of the First Amendment to the United States Constitution and the cases beginning with *New York Times v. Sullivan* (1964), 376 U.S. 254. Although the case was tried on the basis of police officer Akins being a public official, the trial jury was instructed thirteen times that Plaintiff need prove his case only by a "*preponderance* of the evidence", and the Oklahoma court expressly so held, as shown by Appendices attached. After the Court's original Opinion setting forth in such detail the "*any* competent evidence" standard, the Petition for Rehearing and the amici briefs focused on the necessity of the Oklahoma Supreme Court examining the record for "proof of *convincing clarity.*" The Oklahoma Supreme Court held the matter for two and one-half years and then denied the rehearing. However, the Court did *not* in its rehearing Opinion modify the basic portions of its original Opinion (Appendix A), and left in effect the following on pages 3 and 4:

> "Here, this appeal comes after jury verdict. In *Wat Henry Pontiac v. Pitcock,* Okl., 301 P.2d 203 (1956), this court's syllabus states:
>
> > 'In a law action the verdict of the jury is conclusive as to all disputed facts and all conflicting statements, and where there is *any competent evidence* reasonably tending to support the verdict of the jury, this court will not disturb its verdict and judgment based thereon.'

> "The scope of this review is *limited.* We need only to determine if 'there is *any* competent evidence reasonably tending to support the verdict.' . . .
>
> "We *do not weigh* the evidence."

Again on page 4:

> "Briefs of the parties in this appeal agree the evidence does not sustain a finding the news item was published with knowledge it was false."

Finally, in the penultimate paragraph of the Opinion, on typed page 6, the Court concluded:

> "Where there is *any* competent evidence reasonably tending to support the verdict, this court does not disturb it."

The Court itself italicized the word *"any"* (the other italics are ours) apparently to make clear its refusal to follow the *clear and convincing* evidence standard. Thus, we have a 5-to-4 decision by the Oklahoma Supreme Court in which the Court apparently gives lip service in a slight degree to the requirement of proof by "clear and convincing evidence." The Court changed its original opinion to exclude the reference to the erroneous "preponderance of the evidence" instruction, which instruction the lower court has emphasized on 13 separate occasions to the jury. The Oklahoma Supreme Court instead inserted the trial court's almost passing reference to the "clear and convincing" instruction which the trial court had mentioned on one lone occasion to the jury.

But the Oklahoma Supreme Court still leaves in effect its earlier opinion *affirming* the trial court decision, without even mentioning *any review of the record* under the *"clear and convincing"* evidence standard.

The Oklahoma Supreme Court left in its Opinion its specific holding earlier in the Opinion (Appendix A) repeated in the penultimate paragraph:

> "Where there is *any* competent evidence reasonably tending to support the verdict this court does not disturb it."

This case in some respects is like *Beckley v. Hanks* (1967), 389 U.S. 81, although here defendants raised the question of the proper standard of evidence throughout (See paragraph (h) of this Petition).

In order for plaintiff to recover here, the appellate court must find from its own independent review of the proof that plaintiff showed "by *proof of convincing clarity* that the publication was *false* and that the defendants here *knew* it was false or had *serious doubts* (reckless disregard) as to its truth". See *New York Times v. Sullivan* (1964), 376 U.S. 254, at 286; *St. Amant v. Thompson* (1968), 390 U.S. at 731; and *Beckley v. Hanks* (1967), 389 U.S. at 83.

To illustrate how this Court has proceeded in requiring this standard, we consider *Beckley, supra.* There, the court pointed out at page 82:

> "The jury was instructed in part that it could find for the respondent if it were shown that petitioner had published the editorials 'with bad or corrupt motive' or 'from personal spite, ill will or a desire to injure plaintiff'. Because petitioner failed to object to this erroneous interpretation of New York Times at trial, and in fact offered instructions which were themselves inadequate, the issue of these instructions is not before us. However, since it is clear that the jury verdict was rendered upon instructions which misstated the law and since petitioner has properly challenged the sufficiency of the evidence, we have

undertaken an independent examination of the record as a whole 'so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.' New York Times v. Sullivan, supra, at 285."

* * *

"Our examination of the whole record satisfies us that 'the proof presented to show actual malice *lacks the convincing clarity* which the constitutional standard demands . . . '. 376 U.S. at 285-286, 11 L.Ed. 2d at 710, 95 A.L.R.2d 1412."

"Neither this passage nor anything else in the record reveals 'the high degree of awareness of . . . probable falsity demanded by *New York Times* . . .'. *Garrison v. Louisiana,* 379 U.S. 64, 74, 13 L.Ed. 2d 125, 133, 85 S.Ct. 209; it cannot be said on this record that any failure of petitioner to make a prior investigation constituted proof sufficient to present a jury question whether the statements were published with reckless disregard of whether they were false or not."

Thus, in *Beckley,* this Court, on its own, reviewed the record, and reversed the case *without even oral argument, despite the failure of defendant's attorney to raise properly constitutional issues at the trial, and actually requesting improper instructions.* We quote from page 900 of the Annotation at 28 L.Ed.2d, referring to *Beckley:*

"On cross-examination, the newspaper's president and general manager *admitted that no specific investigation was made before the editorials were written, and that the only basis for the quoted statement was the editorial writer's cause to feel that there was a possibility* that the court clerk had threatened the other official. In reversing a judgment based on a

jury verdict against the newspaper, the court said that *the failure to investigate did not present a jury question* whether the statements were published with a reckless disregard of whether they were false or not, and that the record did not show the high degree of awareness of falsity required by the New York Times rule."

In that case, just as in *St. Amant,* 390 U.S. at 733, and *Curtis v. Butts* (1967), 388 U.S. at 153, the court held that failure to investigate does not itself establish bad faith, and that investigatory failure alone is insufficient to satisfy the Constitutional standard and justify a verdict for plaintiff.

Thereafter, when the case came back down from the United States Supreme Court, summary judgment was entered by the trial court and affirmed by the West Virginia Appellate Court (173 S.E.2d 816).

In *Greenbelt v. Bresler* (1970), 398 U.S. 6, at 14, the publication accused the plaintiff public official of blackmail. This Court again held that plaintiff did not meet the Constitutional standard and when the case went back down, judgment for the newspaper was affirmed.

In the writer's case of *Ocala Star-Banner v. Damron* (1971), 401 U.S. 295, the newspaper, by pure mistake and mental lapse on the part of the news editor, published a false story that the plaintiff public official had been convicted of perjury. The jury brought in a verdict for the plaintiff, post-trial motions were denied, the Florida District Court of Appeal affirmed, and the Supreme Court of Florida refused certiorari.

However, this Court granted certiorari and unanimously reversed.

Even though the news story had at no place mentioned official capacity but merely referred to plaintiff as a local

garage man, the court held the *New York Times* rule applied. When the case went back down, the same judge who had upheld the jury verdict and denied post-trial motions, entered up summary judgment for the newspaper. The Florida District Court of Appeal, at 263 So.2d 291 (Fla. D.C.A.1-1972), unanimously affirmed, stating at page 292:

> "Apparently, the Federal Supreme Court has ruled that a public figure is without recourse when the news media, without proof of 'express malice' of *'convincing clarity'*, chooses to publish defamatory falsehoods about such public figure. Thus, we are compelled to affirm the judgment appealed."

We quote from the concurring opinion of Mr. Justice White, 401 U.S., at 301, as to just why the *New York Times* rule is necessary to protect the right of the public to know what goes on in matters of public interest:

> "Inevitably, New York Times Co. v. Sullivan, 376 U.S. 254, 11 L.Ed.2d 686, 84 S.Ct. 710, 95 A.L.R.2d 1412 (1964) by imposing on libel and slander plaintiffs the burden of showing knowing or reckless falsehood in specified situations will result in extending *constitutional protection to lies and falsehoods* which, though neither knowing nor reckless, do severe damage to personal reputation."
>
> * * *
>
> "The sole basis for protecting publishers who spread false information is that *otherwise the truth would too* often be suppressed. That innocent falsehoods are sometimes protected only to ensure access to the truth has been noted before [*St. Amant v. Thompson*, 390 U.S. 727, 732, 20 L.Ed.2d 262, 267, 88 S.Ct. 1323 (1968)], and it is well that the thought is repeated today in *Time, Inc. v. Pape*, 401 U.S. 279, at 292, 28 L.Ed.2d 45, at 54, 91 S.Ct. 638."

OKLAHOMA COURT VIOLATED STANDARDS

The Oklahoma Supreme Court violated all these admonitions.

The issue of proof of convincing clarity was expressly raised (and the Court held the case on rehearing for two and one-half years on this point). Four of the justices dissented on the denial of the rehearing petition. The majority adhered to their position that "*any* competent evidence" was all that was required.

They did not review the record to ascertain if proof of *clear and convincing clarity* had been adduced. They did *not weigh the evidence.*

And, as stated under heading (h), the Defendants raised the question of insufficient evidence during the trial, on post trial motions, in their grounds for appeal, and on rehearing.

A review of the record by any appellate court would reveal a complete lack of "clear and convincing" evidence to show Defendants had serious doubts as to truth here. [The Oklahoma Supreme Court (Appendix A) expressly held, "Briefs of the parties in this appeal agree the evidence does not sustain a finding the news item was published with knowledge it was *false.*"]

CONCLUSION

The amounts involved here are not large, but there is no basis for any damages at all - let alone punitive damages (See *Gertz v. Welch* (1974), 418 U.S. 323, at 350).

If this court lets stand even small judgments based on completely erroneous and spelled out interpretations

of *New York Times*, it encourages the majority of the Oklahoma Court to continue on its way. Equally, it discourages the four dissenting justices from upholding the law under the First Amendment.

Because of the patent error of the Oklahoma Supreme Court, this court should grant certiorari and reverse the holding that in a public official libel case the standard for review is "*any* competent evidence", and that "we do not weigh the evidence." Further, this court should order the Petitioners to have the complete record sent up for review, and then order judgment for the Petitioners on the basis that no proof of "convincing clarity" was adduced to show knowledge of falsity (already conceded not to exist) or serious doubts as to truth.

Respectfully submitted,

HAROLD B. WAHL
WAHL AND GABEL
Suite 405, Florida Title Building
Jacksonville, Florida 32202
Telephone: (904) 353-7329
Attorneys for Petitioners

ROBERT H. KOONTS
P. O. Box 21008
Greensboro, North Carolina 27420

ROBERT S. BAKER
BAKER, BAKER & WILSON
2140 Liberty Tower
Oklahoma City, Oklahoma 73102
Of Counsel

August 1980

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APPENDIX A

48 O.B.J. 2231 and 51 O.B.J. 1206, 609
P.2d 1263

IN THE
SUPREME COURT OF THE STATE OF OKLAHOMA

No. 48,489

BILL AKINS,
Appellee,

v.

ALTUS NEWSPAPERS, INC., an Oklahoma corporation dba ALTUS TIMES DEMOCRAT, BOB GILMORE, SANDRA HART and CRAIG HARRIS,
Appellants.

APPEAL FROM THE DISTRICT COURT OF
JACKSON COUNTY, OKLAHOMA
HONORABLE LOYS CRISWELL, TRIAL JUDGE

(Filed October 4, 1977)

Action for libel based on a news item published in a newspaper. Jury verdict returned for plaintiff that awarded general and exemplary damages. Defendants appeal.

AFFIRMED.

Keith Myers,
Hollis, Oklahoma,
For Appellee,
Robert S. Baker,
Baker, Baker & Wilson,
Oklahoma City, Oklahoma,

Whiteside & Watt,
Altus, Oklahoma,
For Appellants.

LAVENDER, V.C.J.:

Bill Akins (Akins), appellee, brought suit for libel against Altus Newspapers, Inc.; Bob Gilmore, its publisher; Sandra Hart, its editor; and Craig Harris, its reporter, appellants. The libel is based on a published news item. Trial was to a jury with a verdict returned for Akins that awarded $5,000 general damages and $15,000 exemplary damages. Defendants appeal.

The published news item read:

" 'INCIDENT' INVESTIGATED

"An investigation is beginning today by the District Attorney's office concerning an incident where an Altus police officer allegedly kidnapped a boy at gunpoint and then got in an altercation with a Jackson County Deputy.

"Paul Braun, district attorney, told The Altus Times-Democrat today that such an investigation is 'a policy matter with my office' whenever a complaint is lodged against a law officer.

"The district attorney declined to give the name of the family lodging the complaint.

"According to information received, two teenage youths got into a fight near Blair sometime last night with Altus police officer Bill Akins, a father of one of the boys, allegedly going to Blair and removing the other youth from a Blair home at gunpoint.

"The incident was apparently further complicated when relatives of the 'removed' youth called the Jackson County Sheriff's Department asking for help.

"Deputy Sheriff Bill Smith then reportedly found the auto, tried to stop it with siren and warning lights,

and finally discharged his revolver in the air before the auto stopped.

"When the auto stopped, both Smith and Akins became embroiled in some type of altercation. Information received does not specify whether there was a fist fight.

"Neither Smith nor Akins could be contacted as of press time today concerning the incident."

Testimony at trial and detailed narratives of that evidence contained in the appeal briefs show an incident occurring the night of August 14, 1975, as found in broad outline in the published item. There were both large areas of agreement and deep disagreement on details of the involved incident presented to the jury by the trial witness. Much of that evidence is not material to this appeal.

Akins was a police officer. It is disputed if he was on duty that night at the time of, or after, the occurrence. Harris, the reporter, wrote the item the next day. It was published that same day after approval by the editor and the publisher. A retraction was sought and refused. After an outside investigation by the newspaper, another item was published August 28, some thirteen days later, that advised the use of the term "gunpoint" in the first article was erroneous.

Appellants argue (1) truth of the publication; (2) lack of actual malice; and (3) lack of damages.

Here, this appeal comes after jury verdict. In *Wat Henry Pontiac v. Pitcock*, Okl., 301 P.2d 203 (1956), this court's syllabus states:

"In a law action the verdict of the jury is conclusive as to all disputed facts and all conflicting state-

ments, and where there is any competent evidence reasonably tending to support the verdict of the jury, this court will not disturb its verdict and judgment based thereon."

The scope of this review is limited. We need only to determine if "there is any competent evidence reasonably tending to support the verdict." (Italics added) The instructions, as directions in reference to the law of the case guiding the jury,[1] are not an issue in this appeal.

Argument is made that the evidence only showed the truthfulness of the publication, for that affirmative defense is established when the publication is substantially true. *Gomba v. McLaughlin,* Colo., 504 P.2d 337 (1973) is cited. There the justification of every word in the defamatory matter was not required; rather, it was sufficient if the substance, the gist, the sting of the matter was true.

Even if *Gomba, supra,* is applied, we come to opposite conclusion here. The "sting" in this published news item is that Akins, a police officer, was alleged to have kidnapped or "removed" a youth from his home "at gunpoint." Appellants' second published article acknowledges the inaccuracy of the use of "gunpoint." Witness Lane, who was with Akins at the removal and whose grandson was with the Akins boy when the teenager fight occurred, testified of the youth voluntarily getting into the pickup upon his mother telling him to go ahead so the correct youth in the fight could be identified. This mother testified she saw no guns and Akins made no threat. Other evidence conflicted on the fact issue of the youth voluntarily leaving his home.

---

1. *Midland Valley R. Co. v. Pettie,* 196 Okl. 53, 162 P.2d 543 (1945), in syllabus by the court, said:

"Instructions are directions in reference to the law of the case, guiding the jury in arriving at correct and right conclusions. * * *."

We do not weigh the evidence (Italics added) or the correctness of the finding of the facts by the jury. There was competent evidence that reasonably allowed the jury to find the gist of the article as to Akins was not so substantially true as to require a verdict for the appellants based on the affirmative defense of the truthfulness of the publication.

Briefs of the parties in this appeal agree the evidence does not sustain a finding the news item was published with knowledge it was false. (Italics added) A finding of actual malice must then be based on the publication being made with reckless disregard as to whether it was false or not. Again, the law of the case, as found in the instructions, is not the issue. On the law issue of actual malice, the jury was instructed, in part:

* * *

"You are further instructed that the newspaper article * * * in evidence in this case, concerns the actions of a policeman * * *, who by his employment as such is a public official and that he has the burden of proof in establishing by a preponderance of the evidence * * * that said publication was made with actual malice - that is, * * * or with reckless disregard of whether it was false or not, * * *.

* * *

"A reckless disregard means a conduct which is heedless and shows wanton indifference to consequences. To prove this the Plaintiff must produce sufficient evidence to permit the conclusion that the Defendants in fact entertained serious doubts as to the truth of its publication."

Appellants contend there was no evidence the defendant had serious doubts as to the truth of the publication. We do not agree with that interpretation of the directions guiding the jury. The jury was charged to determine if there was sufficient evidence of heedless conduct to show wanton indifference to consequence so as *to permit a conclusion by the jury* that the defendants entertained serious doubts as to the publication's truth.

Reporter Harris's testimony shows on the night of the incident, he was at the sheriff's office freelancing as a photographer in connection with a major drug raid. That independent job required him to be there all night and until about dawn. His information as to the incident came from overhearing, or engaging in, casual conversations with law officers around that office that night. The next morning, Harris overheard a one-sided telephone conversation of an assistant district attorney talking with his superior, the district attorney. That conversation's thrust was that there should be an investigation to determine, among other things, if a kidnapping at gunpoint occurred. Harris did read a written report by a law officer involved in the incident, but no reference was made to a kidnapping at gunpoint. The district attorney's office did advise him there would be an investigation because a police officer was involved. Harris made no personal contact with anyone involved in the incident before writing his news story and its publication.

Editor Hart read the story. She knew Harris had gone to the district attorney's office. Because the story mentioned the district attorney, she assumed Harris had checked with that official. Before reading the copy, Hart asked Harris if he had "checked it out." Harris replied, "Yes." There was no detailed discussion of the story between the editor and the reporter. Publisher Gilmore

was shown the story by his editor. This is sometimes, but not usually, done. He inquired of Hart, "Can you verify this?" She said, "Yes." Gilmore said, "Run it." All three - the reporter, the editor, and publisher - acknowledged a real concern for, and the seriousness of, a news story that affects one's reputation. No other checking occurred prior to the publication of the first story.

There was evidence of heedless conduct to show wanton indifference to consequences. The jury found the evidence sufficient to permit the jury to conclude the defendants entertained serious doubts as to truth of the publication. This court will not disturb the jury verdict and the judgment based thereon. *Wat Henry Pontiac, supra.*

It is a matter of law for the court to determine if the publication was libelous per se,[2] as opposed to a fact determination for the jury as to the publication being libelous per quod. There are three classes as to words charged to be libelous: (1) Those not possible of defamatory meaning; (2) those reasonably susceptible of both a defamatory and an innocent meaning; and (3) those clearly defamatory on their face.[3] With the published news item containing words of "kidnapped a boy at gunpoint" and "removing the other youth from a Blair home at gunpoint," we place the publication in the third class. The news item is susceptible to only a meaning so as to be clearly defamatory on its face, and is libelous per se. A per se libel allows both general and special damages.[4] The more customary types of actual harm inflicted

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2. *McKenney v. Carpenter*, 42 Okl. 410, 141 P. 779 (1914).

3. *Fite v. Oklahoma Pub Co.*, 147 Okl. 150, 293 P. 1073 (1930).

4. *M.F. Patterson Dental Supply Company, Inc. v. Wadley*, (C.C. 10th, Okl.) 401 F.2d 167, 172 (1968) citing Restatement of the Law of Torts, Libel and Slander, Sections 621, 622.

by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.[5] This was the type of actual injury sought to be proved in the present case. Appellants argue lack of evidence on this damage issue.

Here, Akins testified of his depression and confusion coming after the publication. After reading the article and with all the talk going around in terms of dismissal and suspension, his riding partner on the police force didn't ride with Akins for he "just didn't want to be part of it." *Where there is any competent evidence reasonably tending to support the verdict, this court does not disturb it. Wat Henry Pontiac, supra.* (Italics added except Court italicized word "any")

A cross-petition in error by Akins sought reversal of an order of the trial court that denied attaching of certain items as cost. The order of the trial court is affirmed.

Affirmed.

DAVISON, WILLIAMS, IRWIN, BERRY, SIMMS, and DOOLIN, JJ. concur.

HODGES, C.J. and BARNES, J. concur in part and dissent in part.

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5. *Martin v. Griffin Television, Inc.*, Okl., 549 P.2d 85 (1976).

APPENDIX B

51 O.B.J. 1206, 609 P.2d 1263

IN THE
SUPREME COURT OF THE STATE OF OKLAHOMA

No. 48,489

BILL AKINS,
Appellee,

v.

ALTUS NEWSPAPERS, INC., an Oklahoma corporation dba ALTUS TIMES DEMOCRAT, BOB GILMORE, SANDRA HART and CRAIG HARRIS,
Appellants.

ORDER

(Filed May 12, 1980)

The petition for rehearing of the appellants in this cause is denied, but the opinion of this Court promulgated on October 4, 1977, is modified as follows:

The quotation of the jury instructions, appearing on page 4 of the typewritten opinion and in 48 O.B.J. at 2233, is modified to read:

* * *

"[T]he Plaintiff may not recover damages from the Defendant unless he has proved by clear and convincing evidence that the publication of the article was actuated by actual malice, that is, with knowledge that it was false or that it was published with a reckless disregard of whether it was false or not.

* * *

"A reckless disregard means a conduct which is heedless and shows wanton indifference to consequences. To prove this the Plaintiff must produce sufficient evidence to permit the conclusion that the Defendants in fact entertained serious doubts as to the truth of its publication."

The original Opinion of this court is further amended on page 7 to show the following votes:

DAVISON, WILLIAMS, BERRY, SIMMS, and DOOLIN, JJ, Concur. HODGES, C.J., and BARNES, J., Concur in part and Dissent in part. IRWIN, J., Dissents.

The vote on the recommendation to deny the Petition for Rehearing is as follows:

LAVENDER, C.J., WILLIAMS, SIMMS, DOOLIN, HARGRAVE, JJ., concur. IRWIN, V.C.J., HODGES, BARNES, and OPALA, JJ., dissent.

APPENDIX C-1

ALL INSTRUCTIONS GIVEN BY TRIAL COURT TO JURY - AS TO STANDARD OF EVIDENCE REQUIRED (Italics added by us).

(1)

The burden of proof is upon the Plaintiff to establish by *a preponderance of the evidence* the material allegations of the Petition, and unless the Plaintiff has proved these allegations by *a preponderance of the evidence,* your verdict must be for the Defendant. (T.737)

By *a "preponderance of the evidence"* as the term is used in these instructions, is not necessarily meant the greater number of witnesses testifying to a fact or state of facts, but means that evidence which to your minds is most convincing and seems most probably true. (T.737-38)

(3)

You are further instructed that the newspaper article allegedly printed and published by the Defendants, which you have before you in evidence in this case, concerns the actions of a policeman of the City of Altus, Oklahoma, who by his employment as such is a public official and that he has the burden of proof in establishing by *a preponderance of the evidence* that the defendants published the article as alleged in his Petition in Jackson County, Oklahoma, and that said publication was made with actual malice - that is, with knowledge that it was false or with reckless disregard of whether it was false or not, and if you so find by *a preponderance of evidence* your verdict will be for the Plaintiff but if you do not so find by *a preponderance of the evidence* your verdict will be for the Defendants. (T.739-40)

You are further instructed that the Plaintiff in this case is required to prove damage, past, present or future, resulting to him as a result of the alleged publication of said newspaper article, and you are therefore further instructed that if you find, from *a preponderance of the evidence* in this case, that the defendants in this case maliciously published and circulated said article in Jackson County, Oklahoma, and that Plaintiff has sustained damages as a result thereof, your verdict will be for Plaintiff and unless you so find your verdict will be for the Defendants. (T.740-41)

(3C)

The Plaintiff was at the time of the printed article and still is a member of the Altus Police Department, and as such, he was at that time a public officer, and you are to consider him so during your deliberations. His conduct in the discharge of his official duties is a matter of public interest. Freedom of the press and of speech and discussion upon a subject in which the public has an interest, such as the conduct of a public officer in the discharge of his official duties, is a right guaranteed by the constitution of our country. The constitutional principle is based upon the principle of open debate and discussion on all public matters, and does not turn on the truth of the published statement or of the kind appearing in this case. The Defendants have a constitutional right to publish the article in question here. Even if you find the article contains false or unverified statements as to truth or falsity, and even if you find the article is libelous as to the Plaintiff, nevertheless, the Plaintiff may not recover damages from the Defendant unless he has proved by *clear and convincing evidence* that the publication of the article was actuated by actual malice, that is, with knowledge that it was false or that it was published with a reckless disregard of whether it was false or not. (T.744)

(3F)

You are instructed that as a Policeman for the City of Altus, Oklahoma, the Plaintiff, Bill Akins, is a public official. Law enforcement is a primary function of local government and the public has an interest and right to information in not only the qualifications, but also the conduct of law enforcement officers at the "on the street" level. The abuse of a policeman's office can have great potentiality for social harm; hence, public discussion and public criticism directed towards the performance of that office is relevant for publication.

Because of the legitimate public interest in all law enforcement officers and their conduct, newspaper reporting of their activities is encouraged. If a false statement is published concerning an officer, but it is done in good faith, the officer may not recover damages. Only in the event that an officer proves that a statement was published with actual malice may the officer recover damages. (T.746-47)

(3G)

You are instructed that Plaintiff must prove his damages by *a preponderance of the evidence.* You are not allowed to guess or speculate as to the Plaintiff's damages. If the Plaintiff has not proven his damages, if any, to your satisfaction by *a preponderance of the evidence,* then you cannot award anything more than nominal damages to the Plaintiff. (T.747)

(5)

You are instructed that if you find and believe from *a preponderance of the evidence* that the defendants were guilty of oppression or malice, actual or presumed, and acted with evil intent in the premises, you may, in addition to actual damages, if any, give damages for the sake of example and by way of punishment to the defendants, that is to say, the jury will not be limited to mere compensation

for actual damages sustained by the plaintiff, if any, but you may give the Plaintiff such further damages as you may think right in view of all the circumstances proved at the trial, as punishment to the defendants, and as salutary example to others to deter them from offending in like manner, if you find the facts and circumstances shown in the evidence to warrant the implication of malice or evil intent. Malice would be presumed if the acts and conduct of the defendants were so wilful and wanton as to show a reckless disregard for the rights of the plaintiff.

In this connection you are instructed that you are not authorized to award exemplary damages unless you first award the plaintiff actual damages under the evidence and instructions given you. (T.755)

(6)

Now if you find by *a preponderance of the evidence* that the plaintiff has proved the material allegations of his petition then your verdict shall be for the plaintiff and against the defendants for actual damages in an amount not to exceed ($50,000) Fifty Thousand Dollars and unless you so find your verdict shall be for the defendants. (T.757)

You are also instructed that if you find by *a preponderance of the evidence* that the defendants were guilty of acts of oppression, gross negligence, or malice either actual inferred or presumed, in reckless disregard of the plaintiff's rights in publishing the article in the newspaper as alleged in plaintiff's petition and that said acts proximately caused injury to the reputation of the plaintiff as alleged in his petition and if you believe that justice and the public good require it, you may award plaintiff an amount in punitive or exemplary damages which will serve to punish the defendants and to deter others from the commission of like offenses in an amount not to exceed ($100,000) One Hundred Thousand Dollars. However, if you fail to so find by *a preponderance of the evidence* your verdict shall be for the defendants. (T.758-59)

APPENDIX C-2

(In Trial Court)

EXCERPTS FROM GROUNDS OF MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE FOR NEW TRIAL

Fourth: That the verdict is not sustained by sufficient evidence and is contrary to law.

Fifth: That the verdict is contrary to and in disregard of the Court's instructions.

Eighth: Error of the Court in overruling the demurrer to the evidence of plaintiff.

Ninth: Error of the Court in refusing the preemptory instruction and motion for directed verdict requested by defendants.

APPENDIX C-3

EXCERPTS FROM GROUNDS OF APPEAL
TO OKLAHOMA SUPREME COURT

(PETITION IN ERROR)

d. That the verdict is not sustained by sufficient evidence and is contrary to law.

e. That the verdict is contrary to and in disregard of the court's instructions.

g. Error of the Court in overruling appellants' Motion for Judgment on the pleadings and opening statement.

h. Error of the Court in overruling the demurrer to the evidence of the appellee.

i. Error of the Court in refusing the peremptory instruction and directed verdict requested by said appellants.

k. Error of the Court in overruling motion of said appellants for judgment notwithstanding the verdict.

l. Error of the Court in denying appellants' Motion for New Trial.

(Grounds for Petition for Rehearing set out in full in paragraph (h) of Petition.)

Supreme Court, U. S.
FILED
OCT 2 1980
MICHAEL RODAK, JR., CLERK

No. 80-151

In the Supreme Court of the United States

October Term, 1980

ALTUS NEWSPAPERS, INC., an Oklahoma Corporation d/b/a ALTUS TIMES DEMOCRAT, BOB GILMORE, SANDRA HART, and CRAIG HARRIS,
Petitioners (Defendants),

vs.

BILL AKINS,
Respondent (Plaintiff).

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

KEITH MYERS
(*Counsel of Record*)
MYERS, MOLLISON & WEBER
Suite 400, NBC Building
Altus, Oklahoma 73521
405-482-1975
Attorney for Respondent

October, 1980

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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No. 80-151

In the Supreme Court of the United States

October Term, 1980

ALTUS NEWSPAPERS, INC., an Oklahoma Corporation d/b/a ALTUS TIMES DEMOCRAT, BOB GILMORE, SANDRA HART, and CRAIG HARRIS,
Petitioners (Defendants),

vs.

BILL AKINS,
Respondent (Plaintiff).

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

CONCISE STATEMENT OF THE CASE

On August 15, 1974, Defendants published a front page news story wherein it was alleged that the Plaintiff-Respondent, a city police officer, had kidnapped a youth at gunpoint, and engaged in an altercation with another law officer. (Refer to the Article reprinted verbatim in Appendix A of the Petitioners' Writ of Certiorari.)

After the Plaintiff-Respondent made a written demand for retraction of the story, the Defendants' engaged the

services of a private investigator to ascertain the facts. On August 28, 1974, as a result of the investigation, a follow-up story was published wherein the Defendants admitted that the portion of the August 15, 1974 story pertaining to "gunpoint" was erroneous. The balance of the August 15, 1974 story was enlarged upon.

The Defendant, CRAIG HARRIS, who was the reporter that compiled and submitted the story for publication, testified at trial substantially as follows: That he first heard of the incident which gave rise to the story of August 15, 1974, while he was standing somewhere in the hall of the Sheriff's office, a distance of approximately 25 feet from where a telephone call had been received by one of the under-sheriffs; he could not identify the under-sheriff that had received the telephone call as that individual's back was to the reporter at the time, and the witness only overheard one side of the conversation which in essence was that there was an incident or that something was happening at Blair, Oklahoma (T. 116, 117, 118, 119).

Although the reporter stayed at the Sheriff's office until the early morning hours of August 15, 1974 (T. 126), he did not discuss the incident, either with the officer who had received the telephone call or other officers who had gone to the scene of the incident or any other person (T. 122, 123). By 8:30 a.m. of August 15, 1974, the reporter had submitted to his supervisor, the Defendant, SANDRA HART, a list of the possible stories for the August 15, 1974 publication, and this story was on said list (T. 132). Although there were many individuals involved in this incident, the reporter testified that neither he nor anyone on his behalf drove to Blair, a small town located approximately 8 miles North of the city of Altus, Oklahoma, to interview any of the principals involved

in the incident (T. 134); the reporter, prior to the writing and submission of the story for publication, did not speak with the Plaintiff or Haskell Lane (eyewitness) in person or by phone, both of whom reside in the City of Altus, Oklahoma; nor did he speak with any of the officers involved in the incident (T. 136). Sometime during the morning of August 15, 1974, prior to publication, the reporter again was privy to one side of a telephone conversation between the Assistant District Attorney and the District Attorney, but again merely relied upon his having overheard one side of a telephone conversation in progress (T. 148-152). This reporter finally admitted that he, on August 15, 1974, talked to no one concerning the verification of the contents of the defamatory article which was published of and concerning the Plaintiff on that date (T. 155, 156).

The reporter's original draft of the story, if one ever existed, was presumably destroyed (T. 160, 161).

It was stipulated between the parties that the *New York Times* rule would apply in this case, and the Court instructed as follows:

> "(3C) The Plaintiff was at the time of the printed article and still is a member of the Altus Police Department, and as such, he was at that time, a public officer, and you are to consider him so during your deliberations. His conduct in the discharge of his official duties is a matter of public interest. Freedom of the press and of speech and discussion upon a subject in which the public has an interest, such as the conduct of a public officer of his official duties, is a right guaranteed by the constitution of our country. The constitutional principle is based upon the principle of open debate and discussion on all public matters, and does not turn on the truth of the published statement

or of the kind appearing in this case. The Defendants have a constitutional right to publish the article in question here. Even if you find the article contains false or unverified statements as to truth or falsity, and even if you find the article is libelous as to the Plaintiff, nevertheless, the Plaintiff may not recover damages from the Defendants unless he has proved by CLEAR AND CONVINCING EVIDENCE that the publication of the article was actuated by actual malice, that is, with knowledge that it was false or that it was published with a reckless disregard of whether it was false or not."

On the 28th of March, 1975, a jury, by an eleven to one vote, returned a verdict for the Plaintiff assessing $5,000.00 actual damage and $15,000.00 punitive damages against all of the Defendants. From this verdict and judgment, the Defendants appealed.

STAGE OF PROCEEDINGS WHERE FEDERAL QUESTIONS WERE RAISED

The Petitioner, under this heading, discusses the burden of proof which the jury was instructed that the Plaintiff must sustain in order to recover. This Honorable Court is advised that at no time were any objections made to the instructions that they were given in this case. The Oklahoma Supreme Court has reviewed the instructions and was satisfied that constitutional rights of the Defendants in this case were jealously guarded by reason of the jury instruction setting out the *New York Times* standard of "Clear and convincing evidence".

A challenge as to the sufficiency of the evidence and a Motion for a directed verdict at the close of Plaintiff's case would not serve to preserve objections to jury instructions.

On appeal to the Oklahoma Supreme Court, Defendant-Petitioner herein urged as follows:

> PROPOSITION I - The opinion and order of this Court is wholly inconsistent with controlling decisions of the United States Supreme Court and prior decisions of this Court.
>
> PROPOSITION II - Appellants are entitled to judgment herein as a matter of settled constitutional law, and:
>
> A. This Court must apply the correct evidentiary test in determining if Akins' evidence is sufficient to meet the required constitutional standards.
>
> B. Akins' evidence fails to meet the constitutional standards promulgated by the United States Supreme Court.
>
> C. The Trial Court erred in failing to enter judgment as a matter of law in favor of the Appellants.

The question of sufficiency of the instructions to the jury simply was not raised at trial or on appeal to the Oklahoma Supreme Court. Unless there is fundamental error in the instructions, then the same will not be disturbed on appeal. In the case of *Basden v. Mills,* Okl., 472 P.2d 889 (1970), the Oklahoma Supreme Court was considering the same proposition as the Petitioner asserts in this case. At page 895 of the opinion the following rule was enunciated:

> "In Defendant's remaining propositions, he complains of various instructions given by the Court, and of the submission of various issues to the jury in such instructions. As we have noted, Defendant did not object to any instruction given, and did not present any proposed instruction for the Court's consideration. It

> is well settled that under such circumstances this Court will review the instructions only to determine whether they are free of fundamental error; *Shayler v. West,* 199 Okl. 386, 185 P.2d 957. Nevertheless, because the judgment in this case includes a substantial amount for punitive damages, we have given careful attention to these propositions, and we cannot say that fundamental or prejudicial error was committed."

In Oklahoma, Title 12 O.S. (Laws 1969) §578, requires that the Court furnish copies of all proposed instructions to the Plaintiff and the Defendant prior to the time they are given to the jury. Each party then has the opportunity to dictate their objections to any instruction into the record outside the hearing of the jury. The Oklahoma Supreme Court has said that one purpose of this Statute is to inform the Court of any defect or irregularity in the instructions so that the Court will have the opportunity of correcting any instructions. *McKee v. Neilson,* Okl., 444 P.2d 194 (1968).

The procedure required by 12 O.S. §578 was followed in the case at bar. Both sides had ample opportunity to object to defective or repetitious instructions as well as submitting to the Court requested instructions. Under this fair and judicious proceeding a party will not be heard to complain of the instructions unless there has been fundamental error. In *Hames v. Anderson,* Okl., 571 P.2d 831 (1977), the Plaintiff brought suit for slander. From a verdict for the Plaintiff of $1,000.00 in actual damages and $7,500.00 in punitive damages, the Defendant appealed asserting that the instructions were erroneous. The Court's response is found at page 833:

> "Nor did Anderson object to the 'now complained of' instruction. Rather, the record affirmatively shows Anderson's attorney refused comment or to raise an

objection to the trial court's instruction in an in camera hearing prior to instructing the jury. No requested instructions are argued or found in the appeal record. Absent fundamental error, objection to the instructions was waived. *Wat Henry Pontiac v. Pitcock,* Okl., 301 P.2d 203 (1956)."

The constitutional standard required by *New York Times Company v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), was clearly and succinctly stated to the jury in Instruction 3C, supra.

Further, to illustrate that there was no fundamental error committed in the instructions in this case, please consider Instruction number (3F) which was given to the jury as follows:

"You are instructed as a policeman for the City of Altus, Oklahoma, the Plaintiff, Bill Akins is a public official. Law enforcement is a primary function of local government and the public has an interest and right to information and not only the qualifications, but also the conduct of law enforcement officers at the 'on the street' level. The abuse of a policeman's office can have great potential for social harm; hence, public discussion and public criticism directed toward the performance of that public office is relevant for publication.

"Because of the legitimate public interest in all law enforcement officers and their conduct, newspaper reporting of their activities is encouraged. If a false statement is published concerning an officer, but it is done in good faith, the officer may not recover damages. Only in the event that an officer proves that a statement was published with *actual malice* may the officer recover damages." (T. 746, 747).

The Oklahoma Supreme Court in the opinion denying the Petitioners' Application for Rehearing, entered an Order on May 12, 1980, articulating the clear and convincing evidence rule as required by the *New York Times* case. Oklahoma has adhered to the *New York Times* standard which required the Plaintiff in this case to prove actual malice by clear and convincing evidence.

The Petitioners assert that the Writ should be granted and the Oklahoma Supreme Court reversed due to the state Supreme Court's ruling that upon examining the records, they found competent evidence reasonably tending to support the verdict, and further found and advised that they do not weigh the evidence. The state Court citing *Wat Henry Pontiac v. Pitcock,* Okl., 301 P.2d 203 (1956), stated that in a law action the verdict of a jury is conclusive as to all disputed "competent evidence" reasonably tending to support the verdict of the jury, the Court would not disturb its verdict and judgment based thereon.

Contrary to the assertion by the Petitioner that the Oklahoma Supreme Court refused to examine the record in the case, it appears from the opinion that the record was examined and competent evidence found. The opinion further stated:

> "The scope of this review is limited. We need only to determine if 'there is any competent evidence reasonably tending to support the verdict'."

A review of the record in the case was absolutely essential for the Oklahoma Supreme Court to arrive at the above findings.

REASONS FOR REFUSING THE WRIT

Under the New York Times rule and its progeny, to be liable, the alleged defamer of public officials, must know or have reason to suspect that his publication is false. But given the required proof, damages awarded for defamation abridges neither freedom of speech nor freedom of the press. *Herbert v. Lando,* 435 U.S. 922, 99 S.Ct. 1635, 55 L.Ed.2d 515 (1979).

In the case at bar, the evidence as partially set out in the statement of facts, supra, discloses that there was plenty of reason and evidence upon which the jury could base its conclusion that the Defendants knew or had reason to suspect that the publication was false.

In the *Lando* case, supra, it was held that the Plaintiff may show the existence of actual malice in many ways. In note 12, page 1643, this Court cited 50 Am Jur 2d §455, where it was stated that the existence of malice may be shown by:

> ". . .; or that the Defendant had failed to make a proper investigation before publication of the statement in question."

Such is the case at bar. The evidence led to the overwhelming conclusion that no investigation was conducted by the reporter prior to the publication of the defamatory article.

While the United States Supreme Court has consistently, since the New York Times standard, insisted that Defendant's First and Fourteenth Amendment rights be jealously guarded, it has also reiterated that the individual's interest in his or her reputation is also a basic con-

cern. *Time, Inc. v. Firestone,* 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976).

Rule 17, RULES OF THE SUPREME COURT, adopted on April 14, 1980, effective June 30, 1980, states:

> "CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI
>
> 1. A review on Writ of Certiorari is not a matter of right, but of judicial discretion and will be granted only when there are special and important reasons, therefore. . ."

The Petitioner in this case cites as its special reason that a constitutional question involving First and Fourteenth Amendments to the United States Constitution is involved. The United States Supreme Court, speaking through Mr. Justice Rehnquist, stated in *Time, Inc. v. Firestone,* supra, at page 463:

> "It may be argued that this is sufficient indication the Court found Petitioner at fault within the meaning of *Gertz.* Nothing in that decision or in the First or Fourteenth Amendment requires that in a libel action an Appellate Court treat in detail by written opinion all contentions of the parties, and if the jury or trial judge had found fault in fact, we would be quite willing to read the quoted passages affirming that conclusion.
>
> ". . . Even where a question of fact may have constitutional significance, we normally accord findings of state Courts deference in reviewing constitutional claims here. See, e.g. *Lyons v. Oklahoma,* 322 U.S. 596, 602-603, 64 S.Ct. 1208, 1212-1213, 88 L.Ed. 1481 (1944), *Gallegos v. Nebraska,* 342 U.S. 55, 60-61, 72 S.Ct. 141, 144-145, 96 L.Ed. 86 (1951) (Opinion of Reed, J.). But

> that deference is predicated on our belief that at some point in the State proceedings some fact finder has made a conscious determination of the existence or non-existence of the critical fact. . ."

The above excerpt from the *Firestone* case is indicative of the United States Supreme Court's reluctance to interfere in the orderly judicial process of the several states.

In refusing to review the record in the *Firestone* case to make a determination of fault, the United States Supreme Court was in effect stating that it cannot sit as a reviewing Court for each and every defamation case tried in every state Court.

The *Firestone* case was reversed on other grounds but the majority, speaking through Mr. Justice Rehnquist, at pages 457 and 458, stated that the issue of the truth of the Time article was submitted to the jury and that by returning a verdict for the Respondent (Firestone), the jury necessarily found that the identity of meaning which the Defendant had claimed did not exist.

In effect, the Court has held that the defense of truth is an issue of fact to be determined by the trier of fact.

The Petitioner urges that under the holding in *Beckley v. Hanks,* 389 U.S. 81 (1967), the failure of the reporter in the case at bar to investigate the truth or falsity of the defamatory material did not present a jury question. But this Court has acknowledged that in determining the outer limits of the "knowing or reckless disregard" standard and what evidence constitutes a reckless disregard, each case will have to be judged upon its own facts and merits. *Monitor Patriot Co. v. Roy,* 401 U.S. 265 (1971). No hard, fast rules are readily ascertainable as urged by the Petitioner herein. Failure to properly investigate was one

of the grounds upon which the Court upheld the judgment for the Plaintiff in the *Butts* case. At page 169, the Court said:

> "The slipshod and sketchy investigatory techniques employed to check the veracity of the source and the inferences to be drawn from the few facts believed to be true are detailed at length in the opinion of Mr. Justice Harlen. Suffice it to say that little investigative effort was expended initially, and no additional inquiries were made even after the editors were notified by Respondent and his daughter that the account to be published was completely untrue. Instead, the Saturday Evening Post proceeded on its reckless course with full knowledge of the harm that would likely result from publication of the article." (This is from a concurring opinion of Chief Justice Warren.) (Emphasis added).

The jurors in the case at bar who returned an eleven to one verdict in favor of the Plaintiff were unimpressed by the testimony of the Defendant, Harris, to the effect that he gleaned his material for this defamatory story from two one-sided telephone conversations.

In *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971) a case where the Justices could not reach a majority decision, the dissenting opinion of Justice Harlen joined by Justices Marshall and Stewart addressed the issue of Appellate review. The Opinion beginning at page 62 states:

> ". . ., the principal failing of the plurality opinion is its inadequate appreciation of the limitations imposed by the legal process in accomodating the tension between the state libel and federal constitutional protections given to freedom of speech and press."

and continuing at page 63:

> "Once the evident need to balance the values underlying each is perceived, it might seem, purely as an abstract matter, that the most utilitarian approach would be to scrutinize carefully jury verdict in every libel case in order to ascertain whether the final judgment leaves fully protected whatever First Amendment values transcend the legitimate state interest in protecting the particular Plaintiff who prevailed. This seems to be what is done in the plurality opinion. But we did not embrace this technique in *New York Times*, supra. Instead as my brother Marshall observes, *we there announced a rule of general application, not ordinarily dependent for its implementation upon a case by case examination of trial court verdicts.*" (Emphasis added).

In the State of Oklahoma, the verdict of the jury is conclusive of all disputed facts and all conflicting statements, and where there is any competent evidence reasonably tending to support the verdict of the jury, the Supreme Court will not disturb the judgment based upon that verdict. *Wat Henry Pontiac v. Pitcock*, supra; *Henslee v. Monks, et al.*, Okl., 571 P.2d 440 (1977).

The United States Supreme Court has reaffirmed time and again that the question of truth and of actual malice is one for the jury. Truth and malice were found to be a question for the jury in the case of *Time, Inc. v. Hill*, 385 U.S. 374 (1967). An extreme departure from standards of investigation and reporting ordinarily adhered to by responsible publishers and the question of punitive damages were held to be proper questions for the jury in *Curtis Publishing Company v. Butts*, 388 U.S. 130, 18 L.Ed.2d 1094, 87 S.Ct. 1975 (1967).

The question of malice and good faith were held to be questions for the jury to resolve in the case of *St. Amant v. Thompson,* 390 U.S. 727 (1968). Because the trial judge himself resolved issues of publication and falsehood, the lower Court was reversed in the case of *Ocala Star-Banner Co. v. Damron,* 401 U.S. 295 (1971). Reckless disregard for the truth and vicarious liability were deemed proper questions for the jury in *Cantrell v. Forest City Publishing Co.,* 419 U.S. 245 (1974). Truth was found to be a proper result for the jury in *Time, Inc. v. Firestone,* supra.

CONCLUSION

The Respondent respectfully submits to this Court that the opinion heretofore rendered by the Oklahoma Supreme Court in this case is a proper resolution of the controversy and should be allowed to stand. The opinion as written does not violate any of the constitutional mandates of the United States Constitution or the Oklahoma Constitution. The Defendants were accorded every constitutional protection. It should be noted by this Honorable Court that the instructions in this case were heavily weighted in favor of the Defendants. For example, the "actual malice" instruction was given no less than six times and actual malice was defined no less than three times for the benefit of the jurors. They were also instructed that the Defendants had to publish with serious doubts as to the truth of the article before the Plaintiff could recover. The "serious doubt" instruction is found twice in the instructions.

There could not be a case tried in the State of Oklahoma where the Defendants were accorded more protection of their First Amendment rights than in the case at bar.

This case strikes a constitutional balance between First and Fourteenth Amendment rights on the one hand and

the rights of public officials who are defamed on the other. The *New York Times* standard was applied accurately and consistently throughout the case.

WHEREFORE, the Respondent respectfully prays that the United States Supreme Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

KEITH MYERS
(Counsel of Record)
MYERS, MOLLISON & WEBER
Suite 400, NBC Building
Altus, Oklahoma 73521
405-482-1975
Attorney for Respondent

October, 1980

No. 80-151

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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1980

ALTUS NEWSPAPERS, INC., an Oklahoma corporation d/b/a ALTUS TIMES DEMOCRAT, BOB GILMORE, SANDRA HART, and CRAIG HARRIS,
Petitioners (Defendants),

vs.

BILL AKINS,
Respondent (Plaintiff).

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

PETITIONERS' REPLY BRIEF ON JURISDICTION

HAROLD B. WAHL
(Counsel of Record)
WAHL AND GABEL
Suite 405, Florida Title Building
Jacksonville, Florida 32202
Telephone: (904) 353-7329
Attorneys for Petitioners

ROBERT H. KOONTS
P.O. Box 21008
Greensboro, North Carolina 27420

ROBERT S. BAKER
BAKER, BAKER & WILSON
2140 Liberty Tower
Oklahoma City, Oklahoma 73102
Of Counsel

October, 1980

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

PETITIONERS' REPLY BRIEF ON JURISDICTION

INTRODUCTION

The Petitioners have received on October 6, 1980 the Respondent's Brief in Opposition to Certiorari. Pursuant to Supreme Court Rule 22, Petitioners file this Reply Brief.

The important thing about Respondent's Brief is that it totally misconceives the duty of the Oklahoma court to follow the rulings of this Court requiring, in a New York Times libel suit, clear and convincing proof, rather than "*any* competent evidence."

Respondent also misconceives and erroneously cites the holdings of this Court as to investigation.

Hence, this short Reply Brief.

QUESTIONS PRESENTED FOR REVIEW

We repeat the questions presented for review as found on page 1 of our original brief but which are not quoted or used by the Respondent.

(a) QUESTIONS PRESENTED FOR REVIEW

1. On appellate review of a libel judgment in favor of a public official, does the First Amendment require that the appellate court review the record and find that the plaintiff public official proved his case by proof of *convincing clarity*? And must the jury have been so instructed?

The Oklahoma Supreme Court held "*any* competent evidence" was sufficient, and that "we do *not weigh* the evidence."

2. In such a case, is the Supreme Court of Oklahoma in constitutional and fundamental error when it holds (a) "We need only to determine if 'there is *any* competent evidence reasonably tending to support the verdict'" and (b) "Where there is *any* competent evidence reasonably tending to support the verdict, this Court does not disturb it"?

The Oklahoma court was in fundamental error in not reviewing the record to find proof of *convincing clarity*; and this Court should grant certiorari and reverse, ordering judgment for Petitioners.

INVESTIGATORY FAILURE NOT SUFFICIENT

Respondent's whole case apparently proceeds on the erroneous assumption (as stated on page 13 of its Brief) that "an extreme departure from standards of investigation and reporting ordinarily adhered to by responsible publishers", citing *Curtis v. Butts,* 388 U.S. 130, is sufficient to meet the *New York Times* standard. Respondent relies on the minority opinion which was not followed by the majority of the Court in *Butts.* In *Butts* at page 163 the majority of the Court expressly *rejected* the standard of "extreme departure from standards of investigation" and followed the *New York Times* rule of knowledge of falsity or serious doubts as to truth.

Moreover, in *Butts* at page 153 the Court held "that is to say, such officials were permitted to recover in libel *only* when they could prove that the publication involved was deliberately falsified or published recklessly despite the publisher's awareness of probable falsity. *Investigatory failures alone were held insufficient to satisfy this standard.* See *New York Times,* 376 U.S. at 286-288, 292, and *Garrison v. Louisiana,* 379 U.S. at 73-75, **79".**

Respondent also attempts to rely on *St. Amant v. Thompson* (1968), 390 U.S. 727, although, on page 733, the *St. Amant* court flatly held "failure to investigate does not in itself establish bad faith" (citing *New York Times,* 287-288).

The doctrine was again reaffirmed in *Beckley v. Hanks* (1967), 389 U.S. 81 at 84.

Respondent's thesis is not that the Petitioners knew the story was false or had serious doubts as to its truth, but that the Petitioners did not make a trip to Blair,

Oklahoma, or speak to sufficient witnesses, or make sufficient investigation above that which they did make.

The rule of *Curtis, St. Amant, New York Times,* and *Garrison* applies just as much to Respondent as it did in those cases. Even if the investigation were not as far-reaching or as comprehensive or as minute in detail as the Respondent now suggests (which we vigorously deny), this is not enough. There must be proof of convincing clarity that the Petitioners either knew the publication was false or had serious doubts as to its truth. There was no such proof adduced.

OKLAHOMA COURT FLATLY REJECTED "PROOF OF CONVINCING CLARITY" RULE

As pointed out in our Petition and as now agreed to by Respondent, the Oklahoma court held that instead of having to adduce proof of convincing clarity "*any* competent evidence was all that was required." The Oklahoma court did *not* "*weigh* the evidence."

As stated on pages 4 et seq. of our Petition, the question of proof of convincing clarity was raised throughout the proceedings. The Petition for Rehearing timely filed in the Oklahoma Supreme Court set up that the judgment was bad "because appellees' evidence fails to meet the constitutional standards when measured by the proper constitutional evidentiary test requiring 'convincing clarity'."

This was the burden of the Petition for Rehearing, and the amici briefs stressed this point. The Oklahoma Supreme Court considered this question for two and one-half years. Finally, two and one-half years later, by a 5-to-4 vote, it denied rehearing. It left in the opinion the basic portions of its original opinion (Appendix A to the Petition) and specifically left in effect the following:

"Here, this appeal comes after jury verdict. In *Wat Henry Pontiac v. Pitcock,* Okl., 301 P.2d 203 (1956), this court's syllabus states:

> 'In a law action the verdict of the jury is conclusive as to all disputed facts and all conflicting statements, and where there is *any competent evidence* reasonably tending to support the verdict of the jury, this court will not disturb its verdict and judgment based thereon.'

"The scope of this review is *limited.* We need only to determine if 'there is *any* competent evidence reasonably tending to support the verdict'.

"We *do not weigh* the evidence."

Again on page 4:

> "Briefs of the parties in this appeal agree the evidence does not sustain a finding the news item was published with knowledge it was false."

Finally, in the penultimate paragraph of the Opinion, on typed page 6, the Court concluded:

> "Where there is *any* competent evidence reasonably tending to support the verdict, this court does not disturb it."

The Court itself italicized the word "*any*" (the other italics are ours) apparently to make clear its refusal to follow the *clear and convincing* evidence standard. Thus, the Oklahoma Supreme Court gives lip service in a slight degree to the requirement of proof by "clear and convincing evidence" by making reference to that instruction instead of to the many times repeated instruction "preponderance of the evidence." But it still leaves in effect its earlier opinion affirming the trial court decision on the

basis that *any* competent evidence is sufficient, and that it does *not weigh* the evidence.

If there were any question about what the Oklahoma court did, we think it is removed by the following quotation from page 8 of Respondent's Brief in Opposition. We put this in capital letters because of the importance of this statement by Respondent:

> "THE PETITIONERS ASSERT THAT THE WRIT SHOULD BE GRANTED AND THE OKLAHOMA SUPREME COURT REVERSED DUE TO THE STATE SUPREME COURT'S RULING THAT UPON EXAMINING THE RECORDS, THEY FOUND *COMPETENT* EVIDENCE REASONABLY TENDING TO SUPPORT THE VERDICT, AND FURTHER FOUND AND ADVISED THAT THEY *DO NOT WEIGH THE EVIDENCE*. THE STATE COURT CITING *WAT HENRY PONTIAC V. PITCOCK*, OKL., 301 P.2D 203 (1956), STATED THAT IN A LAW ACTION THE *VERDICT OF A JURY IS CONCLUSIVE* AS TO ALL DISPUTED 'COMPETENT EVIDENCE' REASONABLY TENDING TO SUPPORT THE VERDICT OF THE JURY, THE COURT WOULD NOT DISTURB ITS VERDICT AND JUDGMENT BASED THEREON.
>
> "CONTRARY TO THE ASSERTION BY THE PETITIONER THAT THE OKLAHOMA SUPREME COURT REFUSED TO EXAMINE THE RECORD IN THE CASE, IT APPEARS FROM THE OPINION THAT THE RECORD WAS EXAMINED AND COMPETENT EVIDENCE FOUND. THE OPINION FURTHER STATED:

> 'THE SCOPE OF THIS REVIEW IS *LIMITED*. WE NEED ONLY TO DETERMINE IF "THERE IS *ANY COMPETENT EVIDENCE* REASONABLY TENDING TO SUPPORT THE VERDICT".'
>
> "A REVIEW OF THE RECORD IN THE CASE WAS ABSOLUTELY ESSENTIAL FOR THE OKLAHOMA SUPREME COURT TO ARRIVE AT THE ABOVE FINDINGS." (Italics added by us.)

But the review was not under the test of proof of convincing clarity. The Oklahoma court specifically stated "we do not weigh the evidence" and "any competent evidence" is sufficient.

The Supreme Court of Oklahoma opinion has erroneously and flatly ruled on the question of proof of convincing clarity, and this question and *fundamental* error are thus before this Court. See *Beckley,* supra, and the writer's case of *Ocala Star-Banner v. Damron* (1971), 401 U.S. 295 and cases cited in footnote three.

CONCLUSION

The Oklahoma Supreme Court leaves in effect a libel judgment and specifically states that where there is "any competent evidence" this is sufficient. It states "the scope of this review is *limited—we do not weigh* the evidence", and concludes "where there is *any* competent evidence reasonably tending to support the verdict (the Court itself italicizing the word 'any'), this court does not disturb it."

Denial of certiorari here will discourage the four dissenting judges from upholding the First Amendment and encourage the five majority justices to continue on their way.

Respectfully submitted,

HAROLD B. WAHL
(Counsel of Record)
WAHL AND GABEL
Suite 405, Florida Title Building
Jacksonville, Florida 32202
Telephone: (904) 353-7329
Attorneys for Petitioners

ROBERT H. KOONTS
P.O. Box 21008
Greensboro, North Carolina 27420

ROBERT S. BAKER
BAKER, BAKER & WILSON
2140 Liberty Tower
Oklahoma City, Oklahoma 73102
Of Counsel

October, 1980